No. 76-1599

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

HELEN A. PRYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges her removal from federal employment for insubordination based on her failure to submit to a psychiatric evaluation as part of a fitness-for-duty examination.

On March 8, 1972, petitioner was requested by the Director of Personnel, Office of the Secretary of Defense, to report for a fitness-for-duty examination, including both a physical examination and a psychiatric evaluation (Pet. App. F). The letter stated that petitioner could choose her own physician if she preferred and that she could name a representative to assist her. Petitioner reported for the physical examination on March 16, 1972, but she did not submit to psychiatric evaluation (Pet. App. E 20a). On a return visit, the examining physician, Dr. Mayer, suggested

to petitioner that she see the staff psychiatrist, but she failed to do so (App. C).[1]

Based on Dr. Mayer's observations,[2] Dr. Pease, the Director of the Health Service, recommended that petitioner be evaluated by a psychiatrist before any final determination regarding her fitness for duty was made (App. D). The Director of Personnel again asked petitioner to report for a psychiatric evaluation on April 25, 1972; again she was given the option of naming her own psychiatrist and a representative to assist her (Pet. App. G). Petitioner named a representative but failed to report for the scheduled evaluation (Pet. App. E 21a-22a).

A final attempt, in June 1972, to have petitioner undergo psychiatric evaluation also was unsuccessful (Pet. App. H). In August 1972, a request was submitted to the Civil Service Commission for petitioner's disability retirement but was dismissed because petitioner failed to cooperate with the medical officer (Pet. App. D 10a-11a).

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[1]"App." refers to the appendix to the government's motion for summary judgment in the Court of Claims.

[2]Dr. Mayer's impressions were summarized in his report as follows (App. C):

> While here, I tried to convince her that talking with our psychiatrist, Dr. Bache, would be to her advantage. But Mrs. Pryor began to talk some kind of law suit which she has against the labor department, and that her private doctor told her not to talk with anybody about it except with her lawyers. She says she has 4 lawyers who help her in the suit.
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> * * * * *
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> My general impression is that Mrs. Pryor must have many unresolved unconscious conflicts which make her emotionally maladapted. Her thinking and judgment seems [sic] to be impaired; she is accident prone, and she appears to have false beliefs. Her attitude toward her previous accidents also includes an element of compensation neurosis.

On July 17, 1973, petitioner was sent a Notice of Proposed Removal on grounds of insubordination based on her "refusal to submit to a psychiatric evaluation as part of a fitness-for-duty examination" (Pet. App. I 32a).[3] The Notice detailed the facts supporting the charge of insubordination, informed petitioner that she had a right to reply to the charge personally or in writing or both, and stated that she had a right to review the materials on which the agency was relying (Pet. App. I). Petitioner did obtain access to the materials on which the agency relied but was denied access to other requested material that the agency deemed irrelevant to the issue (Pet. App. D 10a).

On October 4, 1973, petitioner was notified that the grounds for removal stated in the July 17 Notice had been found to be supported by the evidence (Pet. App. J) and that she would be removed effective October 12, 1973. Petitioner then appealed to the Appeals Examining Office, Civil Service Commission, which, after a two-day hearing, denied her appeal, finding that there were no procedural defects and that substantial evidence supported the ground for removal (Pet. App. E).

A second appeal, to the Board of Appeals and Review, Civil Service Commission, was also denied on June 7, 1974. The Board found that no procedural rights were violated by the agency or by the hearing examiner and that the removal was not an unduly harsh penalty (Pet. App. D). The Court of Claims sustained the removal (Pet. App. C).

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[3]The Civil Service Commission had held that a previous removal in March 1973 on the same charge was procedurally defective and petitioner was reinstated effective July 16, 1973.

The Court of Claims' decision, affirming the dismissal of petitioner for insubordination, is correct, does not conflict with a decision of any other court of appeals, and does not warrant further review.

Petitioner was removed from her position for insubordination because of her failure to submit to a psychiatric evaluation. Her refusal to submit to the evaluation is not disputed and is amply demonstrated by the record. At the time of her physical examination in March 1972, she refused a psychiatric examination; in April 1972 she failed to keep an appointment for a psychiatric evaluation; and in June 1972 she did not even respond to a request that she report for a psychiatric evaluation. Removal based on insubordination for refusal to submit to a fitness-for-duty examination is a legitimate exercise of agency authority. *Yates* v. *Manale*, 377 F. 2d 888 (C.A. 5).

Petitioner contends, however, that her removal was nonetheless invalid because she was not given an adequate opportunity at her post-removal hearing to challenge the basis on which she was ordered to undergo a fitness-for-duty examination.[4] Although the government must act with some rational basis when it orders a fitness-for-duty

[4]Petitioner apparently does not contend that she must be given an opportunity to challenge the order before her removal. Indeed, this Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134, forecloses such a contention. "[T]he government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Id.* at 168 (Powell, J.). The mere order to undergo a fitness-for-duty examination, which petitioner after all might have passed, itself does not impose a stigma amounting to an infringement of a constitutionally protected liberty interest. Cf. *Bishop* v. *Wood*, 426 U.S. 341; *Paul* v. *Davis*, 424 U.S. 693. The principal issue, therefore, is whether petitioner in this case was entitled to challenge the grounds for the order at her post-removal hearing.

examination, and correspondingly when it orders removal for a failure to comply (*Drucker* v. *United States*, 498 F. 2d 1350 (Ct. Cl.); *Grover* v. *United States*, 200 Ct. Cl. 337, 344), the government is entitled to a presumption that its employees act in good faith (*Drucker* v. *United States*, *supra*, 498 F. 2d at 1352). In the absence of any objective evidence to rebut that presumption, we do not believe that each employee dismissed for insubordination is entitled to compel a full-scale inquiry into the grounds for an order from her superiors. Were the rule otherwise, any dissatisfied employee could provoke a time-consuming investigation of collateral matters and thereby disrupt the normal efficiency of office procedure.

In any event, as the Court of Claims noted (Pet. App. C 5a-6a), the record in this case belies the suggestion that the examination orders were motivated by bad faith. The doctor who examined petitioner in April 1972 suggested to her that psychiatric counseling would be advantageous (see p. 2, *supra*), and, based on that opinion, a recommendation that petitioner undergo a psychiatric examination was forwarded to her supervisors. On April 10, 1972, a letter was sent to petitioner setting forth that recommendation and ordering her to take the examination (Pet. App. G). Petitioner nevertheless refused to obey that order and subsequent orders to the same effect.[5]

[5]The initial letter directing petitioner to take a physical and psychiatric examination was sent on March 8, 1972, before petitioner had been examined by Dr. Mayer. Although we see no basis for believing that the March 1972 order was in any way motivated by bad faith, we note that petitioner was not dismissed until she had refused to obey several subsequent orders to have a psychiatric examination, issued after Dr. Mayer had examined her and Dr. Pease had made that recommendation.

This insubordination, especially in view of the independent medical recommendations, was sufficient grounds for her dismissal.

2. Without raising the issue in the "Questions Presented" section of her petition, petitioner suggests (Pet. 11) that her removal did not comply with applicable agency and Civil Service regulations. Under Rule 23(1)(c) of the Rules of this Court, that issue is not properly before this Court. In any event, petitioner's contention is contrary to the findings of the Board of Appeals and Review (Pet. App. D 9a-13a) and the Court of Claims (Pet. App. C 6a-7a) and does not present an issue meriting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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